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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY LAMAR BROWN,

Defendant and Appellant.

A122198

(Alameda County
Super. Ct. No. C157885)

I. INTRODUCTION

After pleading no contest to an information charging second degree burglary (Pen. Code, § 459),¹ appellant was convicted of that offense and placed on probation for five years. He appeals, claiming that the court erred in denying his section 1538.5 motion. That motion asserted that appellant was illegally detained by the Oakland police while pulling a shopping cart across a street and along a sidewalk early in the morning. We disagree with appellant's contentions and thus affirm his conviction.

II. FACTUAL AND PROCEDURAL BACKGROUND

In the early morning hours of February 19, 2008,² two Oakland police officers were driving in a marked police patrol vehicle in the area of Alice and 17th Streets in Oakland. The lead officer was Officer Mack, who was accompanied by a trainee, Officer Jaeger. Both were in full police uniforms.

¹ Unless otherwise noted, all statutes cited are from the Penal Code.

² All further dates noted are in 2008.

At about 2:28 a.m., the officers observed appellant about to cross Alice Street, heading westbound on 17th Street; he was pulling a shopping cart and doing so “moving along pretty well.” When appellant turned and saw the patrol car, according to Mack his eyes “went very wide” and “really big,” and he appeared “really surprised.” Jaeger testified that appellant registered a “very surprised look on his face, almost shocked and scared.” Appellant “then made an immediate turn” and started pulling the cart northbound on the sidewalk bordering Alice Street, increasing his pace as he did so.

The officers determined to make contact with appellant. To do so, Mack followed appellant down Alice Street for about half a block, and then parked the patrol car in the middle of the block next to appellant. Jaeger exited the vehicle and twice asked appellant, who by then was only five to ten feet away from him, to stop. Appellant did not do so but, rather, looked at Jaeger, stopped pulling the cart, and then began walking away from Jaeger—albeit now without the cart. Appellant walked about three feet away from the cart, whereupon Jaeger closed the distance, got in front of appellant to block his path and, now joined by Mack who had also exited the patrol car, ordered appellant to stop for a third time. Mack asked appellant if he was on probation; appellant replied in the affirmative.

The officers had already noted that the shopping cart had a small logo or placard on its side reading “Safeway,” and that it appeared to be loaded with clothing. The officers were also aware of a shoe store burglary that had occurred four or five blocks away involving the theft of shoes and cash. In addition, Mack, the more experienced of the two officers, had had contacts with a “lot of guys pushing the carts” with stolen goods in them. He noted that appellant’s action in letting go of the shopping cart when originally contacted by Jaeger was highly unusual because, from his 10 years or so experience as a patrol officer, people pulling or pushing such carts on the street “don’t leave the cart behind” when contacted by the police. Both officers also noted that, at nighttime, most homeless people pushing such carts paid little or no attention to a passing patrol car, unlike appellant’s facial reaction, noted above, and also his action in changing course by turning north onto the Alice Street sidewalk.

After Jaeger moved in front of him, appellant started walking toward the officer, putting his hands in his pockets several times and saying: “Why are you stopping me. I’m homeless.” Jaeger asked him to take his hands out of his pockets, but appellant “refused.” At that point, Mack noticed something beneath the garbage bags and cans stacked on appellant’s shopping cart. They appeared to be wires attached to a white object bearing an Apple emblem. Looking through the holes on one of sides of the cart, Mack saw an Apple laptop computer with wires and a power source cord. Mack thereupon decided that a search of the cart was necessary, and directed Jaeger to handcuff appellant. Jaeger did so, and then pat-searched appellant for weapons. Mack removed the plastic bags and clothing from the top of the cart and, in so doing, uncovered an Apple laptop computer with all the associated wiring, an external hard drive, a digital television camera, a smaller digital camcorder, a glove and a rock.

It later developed that the electronics in the cart had been stolen the same night from a video production business about two blocks away on Madison Street. Inside the entry way to that business, police found a rock amidst the broken glass from the open front door. The rock was similar to the one in the Safeway cart appellant had been pulling.

On February 21, appellant was charged by complaint with one count of second degree burglary in violation of section 459. On February 27, he filed a motion to suppress the evidence seized by the police, alleging that his detention on the night of his arrest was improper under section 1538.5. After briefing and a hearing on March 6, the court denied the motion. On March 10, an information was filed charging the same offense as alleged in the complaint. On April 4, appellant filed a section 995 motion seeking to dismiss the complaint on the same grounds. On April 18, that motion, too, was denied.

On April 25, appellant pled no contest to the second-degree burglary count alleged in the information. On May 23, the court placed appellant on formal probation for a period of five years, with no additional jail time, but with victim restitution and fines totaling over \$4,800.

Appellant filed a timely notice of appeal and, in so doing, specifically cited the trial court's denial of his section 1538.5 and section 995 motions.

III. DISCUSSION

A. *Our Standard of Review.*

Appellant appeals from the denial of the section 1538.5 motion, claiming that the two officers involved did not have proper cause to detain him as and when they did.

Our standard of review of such a claim is well-settled. It is as follows: “We apply the Fourth Amendment standard in deciding what remedy may be available following a claim of unlawful search or seizure. [Citations.] [¶] ““An appellate court’s review of a trial court’s ruling on a motion to suppress is governed by well-settled principles. [Citations.] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] ‘The [trial] court’s resolution of each of these inquiries is, of course, subject to appellate review.’ [Citations.] [¶] The court’s resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review.”” [Citation.]” (*People v. Ayala* (2000) 24 Cal.4th 243, 279; see also *People v. Parson* (2008) 44 Cal.4th 332, 345; *People v. Weaver* (2001) 26 Cal.4th 876, 924; *People v. Glaser* (1995) 11 Cal.4th 354, 373; *People v. Sousa* (1994) 9 Cal.4th 224, 231, 240-242 (*Souza*); *People v. Logsdon* (2008) 164 Cal.App.4th 741, 744.)

B. *Appellant’s Detention was Justified by the Totality of the Circumstances.*

Appellant’s counsel summarizes most, but not all, of the relevant considerations in this paragraph of his opening brief to this court: “In the present case, when Jaeger initiated the detention, the officers knew or had observed the following: 1) There had been many burglaries in the area, including a recent shoe store burglary. 2) Appellant

was walking down the street with his shopping cart at 2:30 a.m. 3) After noticing the officers' marked police car, appellant kept walking, and he did not stop in response to Jaeger's initial request. 4) Upon initially noticing the officers, appellant's eyes went wide, indicating to the officers that he was surprised, shocked or scared. 5) Appellant was wheeling a shopping cart with a small 'Safeway' placard on the side."

Appellant concludes this paragraph by stating that the "combination of these circumstances did not support a particularized reasonable suspicion that appellant was involved in any criminal activity."

We disagree because, among other reasons, this summary of the evidence testified to by the two officers omits three other relevant factors, i.e., appellant's (1) sudden change of route (from westbound along 17th Street to northbound along Alice Street) upon seeing the patrol car, (2) initial refusal to take his hands out of his pockets, and (3) refusal—twice—to stop walking away from Jaeger. These combined factors, under the principles laid down by our Supreme Court in *Souza*, justified the stop and detention of appellant.

In *Souza*, in an opinion written by Justice Kennard, the court considered a decision by the Sixth District Court of Appeal which had reversed the conviction of a defendant by the Santa Cruz County Superior Court after that court had denied the defendant's section 1538.5 motion to suppress the evidence of his possession of cocaine after his detention. The drugs were taken from defendant after he was stopped by a Watsonville police officer at approximately 3:00 a.m. in a "high crime area" of that city. The defendant had taken "evasive actions" (*Souza, supra*, 9 Cal.4th at p. 241) when the police patrol car had shined its light on a parked car and two people, including the defendant, standing near it. Citing numerous relevant United States Supreme Court cases on the issue, the court stated: "From these decisions by the United States Supreme Court we distill this principle: A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*Id.* at p. 231.) And it found such totality

of the circumstances in the record before it, namely, “the area’s reputation for criminal activity, the presence of two people near a parked car very late at night and in total darkness, and evasive conduct not only by defendant but by the two occupants of the parked car. . . .” The court then considered each of these “circumstances,” ruled that each was relevant to “whether an investigative detention is reasonable under the Fourth Amendment” (*id.* at p. 240), and hence reversed the decision of the court of appeal. (*Id.* at pp. 240-242.)

Both before and after *Souza*, several other cases have held to the same effect, particularly regarding nighttime detentions in high-crime areas. Thus, in *People v. Lloyd* (1992) 4 Cal.App.4th 724, 733-734 (*Lloyd*), our colleagues in the Fourth District found no ineffective assistance of counsel when a defendant appealed, claiming that his counsel should have brought a section 1538.5 motion regarding his detention at the scene of what later turned out to be a burglary in process. They held: “Here, it was objectively reasonable for the officers to suspect Lloyd was involved in the burglary. The officers found Lloyd standing alone at 4 a.m. next to a business in which a silent alarm had just been triggered. When he saw the officers, Lloyd began walking away. On these facts, the officers acted reasonably under the circumstances in stopping and detaining Lloyd as a possible burglary suspect.”

Similarly, in *People v. Conway* (1994) 25 Cal.App.4th 385, the court affirmed a conviction for burglary after a deputy sheriff had stopped a car containing the defendant at around 3 a.m., as the car was leaving a residential area from which a “burglary in progress” report had just been received. (*Id.* at p. 388.) Citing *Lloyd* (especially the time of day and the silent alarm factors), the Third District held that the trial court had properly denied the defendant’s section 1538.5 motion, stating: “Here, Officer Judd had no description of the suspects and did not know if they had a car. However, the information he received about criminal activity was very current. Less than two minutes after receiving the report of a burglary in progress, he saw a car leaving the area of the reported burglary. The time was approximately 3 a.m., and the officer saw no one else in the area. Under the circumstances, it was objectively reasonable for the officer to suspect

the car’s occupants were involved in the burglary. [Citations.] [¶] We recognize that driving in a residential area early in the morning is consistent with lawful activity. ‘But the possibility that the circumstances are consistent with lawful activity does not render a detention invalid, where the circumstances also raise a reasonable suspicion of criminal activity. The public rightfully expects a police officer to inquire into such circumstances; indeed the principal function of the investigative stop is to resolve that ambiguity.’ [Citation.]” (*Id.* at p. 390.)

Since *Souza*, the principle it enunciated has consistently been relied upon. Thus, in *In re H.M.* (2008) 167 Cal.App.4th 136 (*H.M.*), a panel of the Second District upheld the “pat search” of the subsequently-convicted defendant when that defendant was “(1) . . . running through traffic and nervously looking around . . . ; (2) the area was known for gang activity . . . ; and (4) there had been a shooting a block away the previous day.” Emphasizing one of these factors, that court cited *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 (*Wardlow*), for the proposition that “[n]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion.” (*H.M.*, *supra*, 167 Cal.App.4th at p. 144; see also *People v. Williams* (2007) 156 Cal.App.4th 949, 959 [deputy sheriffs permitted to stop and detain a person driving a motorcycle “before sunrise” on a winding dirt road in the vicinity of marijuana plantings]; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1237-1239 [police stopped a motorcycle in “an active gang area” after a reckless driving complaint and ordered defendant, a passenger on it, to remove his hands from his pockets; he did so, but then placed them back there; subsequent detention and search approved]; *People v. Holloway* (1985) 176 Cal.App.3d 150, 153-155 (*Holloway*) [detention occurred around 3:00 a.m. in an area of Pasadena where narcotics traffic often occurred; defendant observed with others, who fled as police approached, and “manifested surprise” and closed his hand “into a fist” as if he might “discard contraband” when he saw the police]³.)

³ *Holloway* was cited approvingly several times in *Souza*. (See *Souza*, *supra*, 9 Cal.4th at p. 241.)

Several United States Supreme Court decisions are very much to the same effect as *Souza*. Thus, in *Wardlow, supra*, not only did the Court note that “nervous, evasive behavior is a pertinent factor in determining reasonable suspicion” (*Wardlow, supra*, 528 U.S. at p. 124), it also stated that “unprovoked flight is simply not a mere refusal to cooperate.” (*Id.* at p. 125; see also *United States v. Arvizu* (2002) 534 U.S. 266, 273-278.)

Appellant relies principally on *People v. Medina* (2003) 110 Cal.App.4th 171 (*Medina*) and *People v. Perrusquia* (2007) 150 Cal.App.4th 228 (*Perrusquia*) in support of his argument that there were insufficient circumstances observed by Officers Mack and Jaeger to justify appellant’s detention. We find both cases—in which the courts of appeal found there were insufficient circumstances to support the detentions—distinguishable. In *Medina*, the defendant was stopped for driving a car with a broken tail light and then “pat searched” for weapons. The officer explained that it was “‘standard procedure’ to conduct weapons searches in a high gang area late at night,” and that there “‘wasn’t anything specific’ about [the defendant] that would have led him to believe he was armed.” (*Medina, supra*, 150 Cal.App.4th at p. 177.) The appellate court properly found the “standard procedure” inappropriate.

In *Perrusquia*, the detained person was in a car outside an open 7-Eleven store in Anaheim at 11:26 p.m.; the car’s engine was running and an observing officer thought the defendant’s posture in the car “looked suspicious.” (*Perrusquia, supra*, 150 Cal.App.4th at p. 231.) As several officers approached the car, defendant exited it and refused to stop for a pat down search when requested to do so; he was detained, searched, and found to be carrying both several weapons and drugs. (*Ibid.*) But the detention did not occur in either a high crime area, an area near a recent crime (although there had been robberies at other 7-Eleven stores in Anaheim), nor late at night.

As the *H.M.* court observed in distinguishing these two decisions: “[H]ere, the locale did not transform innocent behavior. H.M. was not stopped and frisked merely because he was in gang territory, or as a matter of routine procedure. To the contrary, as we have discussed, H.M.’s curious activities strongly suggested criminal activity was

afoot, leading an experienced officer to conclude H.M. might well be armed. These circumstances distinguish this case from cases such as *People v. Perrusquia*, *supra* [citation] and *People v. Medina*, *supra* [citation]. In *Perrusquia*, factors unrelated to the defendant—the nature of the location and a recent string of robberies—formed the primary basis for the officer’s detention of the defendant. [Citation.] In *Medina*, an officer stopped the defendant for driving with a broken taillight. Although there “‘wasn’t anything specific’” about Medina that led the officer to conclude he might be armed, the officer pat searched him as a matter of “‘standard procedure’” because they were in a “‘high-gang location’” at night. [Citation.] *Medina* concluded that, although Medina was lawfully stopped, the frisk violated the Fourth Amendment because minor traffic offenses do not reasonably suggest the presence of weapons. [Citation.] In contrast to these cases, [the suspicions of the officer] were aroused based on factors directly related to H.M., i.e., his suspicious behavior and his prior contacts with police.” (*H.M.*, *supra*, 167 Cal.App.4th at pp. 147-148.)

B. Even One Factor—the Safeway Logo on the Shopping Cart—Justified the Detention.

As noted above, before appellant was detained both officers had noted the Safeway placard on the side of the shopping cart being pulled by appellant. Both also testified that, in and of itself, they found this troubling as, per Officer Jaeger, “it was not his property. Most likely stolen” and, per Officer Mack, “having a cart is illegal. It’s actually a felony to possess the cart. It’s stolen property. It says ‘Safeway’ on the side of it. He’s not allowed to possess the cart.”

Actually, Mack was mistaken: it is a misdemeanor, not a felony, as prescribed by Business and Professions Code sections 22435 et seq. The first of those sections defines what is meant by “shopping cart,” following which section 22435.2 states: “It is unlawful to do any of the following acts, if a shopping cart . . . has a permanently affixed sign as provided in Section 22435.1: . . . [¶] (b) To be in possession of any shopping cart . . . that has been removed from the premises or the parking area of a retail establishment, with the intent to temporarily or permanently deprive the owner or retailer of possession of the cart” or (f) “To be in possession of any shopping cart . . . while that cart is not located on

the premises . . . of a retail establishment, with the intent to temporarily or permanently deprive the owner or retailer of possession of the cart.” (Bus. & Prof. Code, § 22435.2, subds. (b) & (f).) Section 22435.3 then provides that a violation of that section constitutes a misdemeanor.

Another section, section 22435.1, defines what is meant by the term “permanently affixed sign” as used in section 22435.2: “The provisions of Section 22435.2 shall apply when a shopping cart or a laundry cart has a sign permanently affixed to it that identifies the owner of the cart or the retailer, or both; notifies the public of the procedure to be utilized for authorized removal of the cart from the premises; notifies the public that the unauthorized removal of the cart from the premises or parking area of the retail establishment, or the unauthorized possession of the cart, is a violation of state law; and lists a valid telephone number or address for returning the cart removed from the premises or parking area to the owner or retailer.” (Bus. & Prof. Code, § 22435.1.)

The Attorney General argues that this provision, plus both officers’ observations of the placard and their reactions to it, justified the detention.⁴ Appellant disagrees, arguing that there was no evidence that the Safeway placard observed by the officers met the definition of “permanently affixed sign” as that term is defined in section 22435.1.

We agree with respondent. The law is clear that when the police see an individual on the street in possession of what could well be stolen or purloined items, a temporary detention is perfectly acceptable. The test is whether “the undisputed facts [provide] an objective legal basis” (*In re Justin K.* (2002) 98 Cal.App.4th 695, 700) for the stop and detention of a person on the street or the stop of a vehicle. For example, a variety of Vehicle Code violations apparent to an officer have been held to justify the stop of a car. (See, e.g., *id.* at p. 700; *People v. Saunders* (2006) 38 Cal.4th 1129, 1135-1137 & *People*

⁴ We do not agree, however, with two alternative contentions made by the Attorney General, i.e., that the search of the cart was justified by appellant’s “abandonment” of it and that he was not legally “detained” until he was handcuffed after Mack saw the Apple computer under the clothes in the cart. We think the factual record in this case does not support either of these contentions.

v. Hoyos (2007) 41 Cal.4th 872, 892-893.) The detention of a person carrying a television set along the street in a high crime area is similarly justified. (See, e.g., *People v. Myles* (1975) 50 Cal.App.3d 423, 430.)

A well-known author sums up the law on this subject thusly: “The more typical case [is] that the officer is not assessing the observed events in terms of their relationship to a particular prior offense of which he is aware. Rather, the policeman is considering how his first-hand knowledge itself shows that the property he now sees probably was acquired illegally on some prior occasion. Probable cause can exist in such circumstances, for it is not essential to a finding of probable cause that the officer be able to relate the person or the property to some particular prior crime.” (2 LaFare, Search and Seizure (4th ed. 2004), § 3.6(a), p. 306; fn. omitted.)

In view of both this law and the clear language of Business and Profession Code section 22435.2, subdivisions (b) and (f), the detention of a person such as appellant pulling a shopping cart carrying a retail store’s placard at 3:00 a.m. in the morning is appropriate. Appellant argues that these provisions cannot be applied on the facts of this case because there is no evidence on the record that either of the officers had specifically determined that the Safeway placard was the type defined in section 22435.1, quoted above. We have no difficulty in rejecting this argument: when, at 3:00 a.m., the police see a person (1) pulling a crammed shopping cart with a visible—to both of them—Safeway placard and (2) obviously not anxious to make contact with them, it defies logic to require the police to make absolutely certain that the placard satisfies the definition of “permanently affixed sign” in section 22435.1 before asking that person to stop.

IV. DISPOSITION

The judgment is affirmed.

Haerle, Acting P.J.

We concur:

Lambden, J.

Richman, J.